LIBRARY
SUPREME COURT U.S.

Office - Supreme Court, U.S.
FILED
JUL 12 1957
JOHN T. FEY, Clerk

IN THE

Supreme Court of the United States

OCTOBER TERM, 1957.

No. 264

MONTGOMERY WARD & CO., INC.,

Petitioner,

vs.

NATIONAL LABOR RELATIONS BOARD.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT.

CHARLES J. BARNHILL
DAVID L. DICKSON
619 West Chicago Ave.
Chicago 7, Illinois

T. W. MADDEN
75 Varick St.
New York 13, New York
Attorneys for Petitioner

UNITED STATES LAW PRINTING CO., CHICAGO 18, ILL. LAKEVIEW 5-6581

INDEX.

	PAGE
Opinions Below	2
Jurisdiction	2
Questions Presented	3
Constitutional Provision, Statutes and Regulations Involved	4
Statement of the Case	5
Reasons for the Allowance of the Writ	10
I. The National Labor Relations Board may not lawfully find wrongful intent to discharge, in violation of Section 8(a)(3) of the National Labor Relations Act, by imputing as a matter of law to Petitioner's management the knowledge and anti-union intent of a subordinate department head who took no part in the discharges and had no authority over the discharged employees	10
II. The National Labor Relations Board may not lawfully base a finding of wrongful discharge, in violation of Section 8(a)(3) of the National Labor Relations Act, on the knowledge and intent shown by the anti-union remarks of a subordinate department head who contemporaneously voted as a non-supervisory employee on petition of the charging union in a consent election conducted by the Board	15

PAGE

III. The National Labor Relations Board's finding of wrongful discharge, in violation of Section 8(a)(3) of the National Labor Relations Act, is not supported by substantial evidence on the Record considered as a whole, because it ignores the actual intent of Petitioner's Management and is based on a holding that the undisputed facts advanced by Petitioner as economic grounds for the discharges are not in the opinion of the Board adequate 21

IV. The National Labor Relations Board's finding of interference, restraint and coercion, in violation of Section 8(a)(1) of the National Labor Relations Act, is not supported by substantial evidence on the record considered as a whole, because it is based on two joking or casual inquiries which were clearly non-coercive 23

Conclusion 26

Appendix 1-A

A. Constitutional Provision, Statutes and Regulations Involved 1-A

B. Opinions and Decree of the Court of Appeals..11-A

AUTHORITIES CITED.

Cases.

E. Anthony & Sons v. N.L.R.B. (C.A. D.C. 1947), 163 F. 2d 22 23

N.L.R.B. v. Associated Dry Goods Corp. (CA 2d 1954), 209 F. 2d 593 25

N.L.R.B. v. Babcock & Wilcox Company (1956), 351 U.S. 105 17

PAGE

N.L.R.B. v. James H. Matthews & Co. (CCA 3rd, 1946), 156 F. 2d 706 ..... 15, 20

N.L.R.B. v. Stafford (CA 8th, 1953), 206 F. 2d 19 13

N.L.R.B. v. Tex-O-Kan Flour Mills Co. (CCA 5th 1941), 122 F. 2d 433 13

Packard Motor Car Co. v. N.L.R.B. (1947), 330 U.S. 485 ..... 15, 18

Radio Officers' Union, etc. v. N.L.R.B. (1954), 347 U.S. 17 ..... 10, 12

Universal Camera Corp. v. N.L.R.B. (1951), 340 U.S. 474 23

Constitutional Provision.

First Amendment to the Constitution of the United States 3, 4, 17

Statute.

National Labor Relations Act, as amended (49 Stat. 449, 61 Stat. 136, 29 U.S.C., Sec. 151 et seq.):

Section 2(3) 4, 5, 15, 18

Section 7 4

Section 8(a) 3, 4, 7, 8, 9, 10, 13, 14, 15, 21, 23, 24, 25

Section 8(c) 4, 17, 19

Section 9(b) 4, 19

Section 9(c) 4

Section 10(b) 4

Section 10(e) 4, 8

Section 14(a) 4, 15, 19

PAGE

Rules.

N.L.R.B. Rules and Regulations (29 Code of Federal Regulations)

Section 102.5 4

Section 102.54(b) 4

Section 102.61 4

N.L.R.B. Statement of Procedure (29 Code of Federal Regulations)

Section 101.18 4

Legislative Materials.

93 Cong. Rec. 3836 (80th Cong., First Sess.) 18

House Report No. 245, p. 33 (80th Cong. First Sess.) 25

IN THE

Supreme Court of the United States

OCTOBER TERM, 1957.

NO.

MONTGOMERY WARD & CO., INC.,

Petitioner,

VS.

NATIONAL LABOR RELATIONS BOARD.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT.

To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

Montgomery Ward & Co., Incorporated, petitioner, prays that a writ of certiorari issue to review the decree entered by the United States Court of Appeals for the Second Circuit on April 5, 1957, enforcing a decision and order of the National Labor Relations Board.

OPINIONS BELOW

This case originated as an unfair labor practice proceeding before the National Labor Relations Board. The record contains the Intermediate Report and Recommended Order of the Trial Examiner (R. 339)[1], the Decision and Order of the Board (R. 387), and the dissenting opinion of Member Peterson (R. 404). The Board's decision is reported in 115 NLRB 645.

The Court of Appeals filed an original opinion (Appendix, *infra*, p. 11-A), and a supplemental opinion on denial of rehearing, modifying the original opinion (App. 23-A). The Court's opinion as modified is reported in 242 F. 2d 497.

JURISDICTION

The decree here sought to be reviewed (App. 20-A), enforcing the Decision and Order of the National Labor Relations Board against petitioner, was entered on April 5, 1957. A petition for rehearing was denied on April 15, 1957 (R. 440). The jurisdiction of this Court is invoked pursuant to 28 USC Sec. 1254(1).

---

[1] The Joint Appendix printed for the use of the court below, together with the proceedings below, has been filed as the Record here, pursuant to Rule 21, Par. 3. Nine additional copies of the Joint Appendix have also been filed, pursuant to Rule 21, Par. 4. Record references in this petition are to pages of the Joint Appendix.

QUESTIONS PRESENTED

1. Whether the National Labor Relations Board may lawfully find wrongful intent to discharge, in violation of Section 8(a)(3) of the National Labor Relations Act as amended, by imputing as a matter of law to petitioner's management the knowledge and anti-union intent of a subordinate department head who did not participate in the discharges and had no authority over the discharged employees, while holding that the actual knowledge and intent of petitioner's management are immaterial.

2. Whether the National Labor Relations Board may lawfully base a finding of wrongful discharge, in violation of Section 8(a)(3) of the National Labor Relations Act as amended, on the knowledge and intent of a subordinate department head, when (a) department heads were specifically included in the unit previously petitioned for by the charging union, (b) department heads voted in the consent election conducted by the Board's Regional Director, and (c) no steps were taken by any one to challenge the ballots of department heads or to alter their status as employees whose right to free speech was protected by the Act and the First Amendment to the United States Constitution.

3. Whether the National Labor Relations Board's finding of wrongful discharge, in violation of Section 8(a)(3) of the National Labor Relations Act, as amended, is supported by substantial evidence on the record considered as a whole, when there is uncontradicted evidence that petitioner's management did not know the union status of the discharged employees, and the Board reached its conclusion of anti-union intent by imputing to said management the knowledge and anti-union intent of a subordinate department head and by holding that the undisputed facts

advanced by petitioner as economic grounds for the discharges were not in its opinion adequate.

4. Whether the National Labor Relations Board's finding that petitioner unlawfully interfered with, restrained and coerced its employees, in violation of Section 8(a)(1) of the National Labor Relations Act as amended, is supported by substantial evidence on the record considered as a whole, when the finding is based on two joking or casual inquiries addressed to employees by petitioner's store manager, containing no threat of reprisal or force or promise of benefit, and the undisputed evidence shows that the employees addressed were not in fact intimidated by the inquiries.

CONSTITUTIONAL PROVISION, STATUTES AND REGULATIONS INVOLVED

The pertinent portions of the following Constitutional Provision, Statutes and Regulations involved in this case are set out verbatim in the Appendix at the pages respectively indicated:

1. The First Amendment to the Constitution of the United States. (App. 1-A).

2. Sections 2(3), 7, 8(a), 8(c), 9(b), 9(c), 10(b), 10(e) and 14(a) of the National Labor Relations Act, as amended by the Labor Management Relations Act, 1947 (49 Stat. 449, 61 Stat. 136, 29 USC §§ 152, 157, 158, 159, 160 and 164). (App. 1-A).

3. Sections 102.5, 102.54(b) and 102.61 of the National Labor Relations Board's Rules and Regulations (29 Code of Federal Regulations, Secs. 102.5, 102.54(b) and 102.61). (App. 5-A).

4. Section 101.18 of the National Labor Relations Board's Statement of Procedure (29 Code of Federal Regulations, Sec. 101.18). (App. 9-A).

STATEMENT OF THE CASE

After the filing of a charge, an additional charge and a first amended charge by Retail Clerks International Association, Local Union No. 1687, AFL, the General Counsel of the National Labor Relations Board through the Regional Director of the Board for the Third Region on November 26, 1954 issued a complaint against petitioner, alleging violations of Sections 8(a)(1) and 8(a)(3) of the National Labor Relations Act, as amended (hereafter referred to as "the Act").

Petitioner operates numerous retail stores throughout the United States, including a store at Binghamton, New York (R. 340). At the time of the events herein described, there were 28 departments in the store, each under the supervision of a department head (R. 344). Aside from the manager and assistant manager, there were 83 employees (R. 10), including the department heads. Leonard DuFour and Frank Felker were department heads of the appliance and farm equipment departments, respectively (R. 350, 358). Gladys Witter was an extra clerk (R. 314) assigned at that time to another department (R. 149). DuFour had no authority over either Felker (R. 350, 358) or Witter (R. 169).

The charge as amended alleged that petitioner wrongfully discharged Felker and Witter, as well as two other employees of the Binghamton store, Gertrude Stoddard and Charles White, on various dates between August 11 and September 18, 1954, and that petitioner by these and other acts interfered with, restrained and coerced the employees of that store in the exercise of their rights under Section 7 of the Act. The complaint eliminated the charge concerning Stoddard. At the commencement of the hearing the charge was withdrawn as to White. The case pro-

ceeded to hearing before the Board's Trial Examiner on the remaining charges, as amplified by a statement of particulars filed by the General Counsel. The particulars based the charges on the alleged conduct of Rumble, the store manager, Brancato, the assistant store manager, and DuFour.

Petitioner denied the alleged violations of the Act, and also pleaded affirmatively that an election had been held among its employees at the Binghamton store on August 17, 1954, on the petition of the same union making the charge; that the union had agreed to the inclusion of DuFour as an employee entitled to vote; that the election had been supervised by the Regional Director of the Board; and that in view of these facts the union was estopped from claiming that DuFour was a supervisor, and his status as an employee had been determined by the Board until such time as it was set aside in some direct proceeding (R. 43-44).

As the Court of Appeals' opinion shows (App. 14-A to 16-A), there was no evidence of any anti-union activity by or on behalf of petitioner, other than the anti-union remarks made by DuFour in private conversations with fellow employees. There was no evidence that these remarks were authorized by petitioner's management or were subsequently made known to it. Notwithstanding the insinuation of the Court of Appeals to the contrary (App. 17-A), there is no claim, no evidence and no finding that DuFour was a management agent or spy.

The Trial Examiner filed an Intermediate Report and Recommended Order (R. 339), in which he found that DuFour was a supervisor who "stood in the place of management" when he made the anti-union statements on which the complaint was predicated (R. 351). He conceded that certain inquiries about the union attributed to

store manager Rumble and assistant manager Brancato, if they stood alone, "might well be considered the sort of isolated remark which would not justify the issuance of an order in this case" (R. 381). He concluded, however, that these inquiries, together with DuFour's expressed opposition to the union, followed by the discharges of Felker and Witter, constituted violations of Sections 8(a)(1) and 8(a)(3) of the Act (R. 381). He recommended an order directing petitioner to cease and desist from interfering with, restraining or coercing its employees by interrogating them or threatening their discharge; requiring petitioner to reinstate employees Witter and Felker; and requiring petitioner to post notices of compliance (R. 383).

Petitioner appealed to the Board, which entered a Decision and Order modifying in some respects the recommended order of the Trial Examiner (R. 387). The Board set aside the Examiner's finding that petitioner was liable for DuFour's conduct and dismissed that portion of the complaint which alleged that petitioner violated Section 8(a)(1) of the Act in this respect (R. 391). The Board also found no violation of the Act by assistant manager Brancato (R. 401). However, the Board found that petitioner was chargeable with the knowledge of union activities acquired by DuFour during his private conversations with various employees, and that his threats and statements to these employees might be considered in determining why petitioner discharged Felker and Witter (R. 391).

Based principally on DuFour's knowledge and intent thus imputed to petitioner, the Board concluded that petitioner was guilty of unlawful discharge of employees Felker and Witter (R. 400). It also found unlawful restraint and coercion, in violation of Section 8(a)(1), based on store manager Rumble's inquiries concerning the union

in two conversations with employees (R. 401). The Board modified the recommended order to eliminate that portion which required petitioner to cease and desist from threatening its employees, but in all other respects adopted the recommended order in substance (R. 402).

Member Peterson dissented, contending that petitioner should have been held liable for DuFour's conduct. He said (R. 406):

> "It seems to me that there is an apparent inconsistency in the majority's refusal to find as unlawful DuFour's threats while at the same time tracing the Employer's responsibility for the discriminatory discharges through this very conduct on the ground that the supervisor 'remains an arm of management.'"

Pursuant to the provisions of Section 10(e) of the National Labor Relations Act as amended (61 Stat. 146, 29 U.S.C. Sec. 160 (e)), the Board petitioned the United States Court of Appeals for the Second Circuit to enforce its Order. The Court granted enforcement. It wrote an original opinion (App. 11-A) and a supplemental opinion on denial of rehearing (App. 23-A). The Court held that the Board was entitled to base its finding of petitioner's motivation for the discharges on DuFour's knowledge of union activities and statements, which the Court found that "the Board is at liberty to impute to the company" (App. 19-A). The Court further held that the fact that DuFour voted in the election "has no necessary connection with his also being an agent of management for purposes of Section 8(a)(3)." (App. 18-A). The Court cited other alleged evidence to support its conclusion (App. 19-A), although it admitted error and deleted reference to part of this alleged evidence when the opinion was modified on denial of rehearing (App. 24-A). The Court also originally said that petitioner did not dispute

the finding that it was guilty of a Section 8(a)(1) violation (App. 20-A), but on rehearing admitted that the finding was disputed (App. 24-A). It then held that the remaining evidence was sufficient on both charges.

Additional pertinent facts will be set forth at appropriate places in the argument.

REASONS FOR THE ALLOWANCE OF THE WRIT

I. The National Labor Relations Board may not lawfully find wrongful intent to discharge, in violation of Section 8(a)(3) of the National Labor Relations Act, by imputing as a matter of law to Petitioner's management the knowledge and anti-union intent of a subordinate department head who took no part in the discharges and had no authority over the discharged employees.

The National Labor Relations Board and the Court below have held that, under a complaint alleging wrongful discharges in violation of Section 8(a)(3) of the National Labor Relations Act as amended, petitioner's real motive for the discharges is immaterial. They have held that petitioner is charged as a matter of law with the private anti-union attitude of a subordinate department head for whose conduct petitioner is not liable, even though that attitude was not known to petitioner's management and was opposed to declared management policy.

This holding is contrary to the rule laid down by this Court in *Radio Officers' Union, etc.* v. *N.L.R.B.* (1954), 347 U.S. 17, and contrary to the decisions of the Courts of Appeals in other circuits.

The undisputed evidence shows that the decisions to discharge employees Felker and Witter were made by regional operating manager Elliott, district manager Levengood, store manager Rumble, or assistant store manager Brancato (R. 226-228, 231-233, 306-308, 115-116, 320-323). The Board and the Court below, however, determined the reason for the discharges from the words of department head DuFour (R. 393, 398-399; App. 17-A, 19-A and 23-A).

The position of the Board is shown by the following paragraph in its decision (R. 391):

> "Applying the above principles to the facts of this case, *we find that, because of the lack of evidence that the Respondent actually or apparently authorized or ratified DuFour's course of conduct, the Respondent is not liable for such conduct.*' We shall therefore dismiss that portion of the complaint which alleged that Respondent violated Section 8(a)(1) of the Act in this respect. However, *we also find that the Respondent is chargeable with the knowledge of union activities acquired by DuFour during the course of his interrogation of various employees, including Felker and Witter, and that his threats and statements to these and other employees may be considered in determining the reason why the Respondent discharged Felker and Witter.*" (Emphasis added.)

In accordance with this position, neither the Trial Examiner nor the Board in the course of their long and detailed reports made any inquiry or any finding as to whether petitioner's management *in fact* had knowledge of DuFour's anti-union remarks and Felker's and Witter's interest in the union, or whether DuFour's remarks *in fact* represented the view of petitioner's management.

The opinion of the Court of Appeals proceeds on the same theory. Thus the Court says that DuFour's "knowledge of union activities and statements as to employer motivation were property imputed to Montgomery Ward" (App. 17-A), and the Court refers to "DuFour's knowledge of union activities and statements of employer intention which we find the Board is at liberty to impute to the company" (App. 19-A).

The only expression in the Court's opinion which might be construed as evincing an interest in the real motives of petitioner's management is the statement that DuFour

"could easily have been very high in management circles without the other employees having any notion of this." (App. 17-A). If the Court intended by this statement to assert as a conclusion of *fact* that the Board was warranted in finding that DuFour was "very high in management circles" the Court must necessarily have found as a *fact* that he was a management spy. That is a conclusion which the Board did not make and which the evidence does not support. Abundant and undisputed evidence shows that DuFour spoke his own mind alone, in private conversations with other employees, and that he did not represent the management view (R. 33-38, 233, 263, 302-303, 305, 330-331).

Thus the following question is squarely presented for decision here: *Can the intent with which petitioner's regional manager, district manager, store manager and assistant manager discharge an employee be determined solely from the state of mind of another person which is not found to be known to them?* We submit that it can not.

The rule applicable to alleged Section 8(a)(3) violations has been clearly set forth by this Court in *Radio Officers' Union, etc.* v. *N.L.R.B.* (1954), 347 U.S. 17, *supra*, where the Court said, p. 43:

> "The relevance of the motivation of the employer in such discrimination has been consistently recognized under both §8(a)(3) and its predecessor. In the first case to reach the Court under the National Labor Relations Act, *National Labor Relations Board* v. *Jones & Laughlin Steel Corp.*, 301 U.S. 1, 57 S.Ct. 615, 628, 81 L. Ed. 893, in which we upheld the constitutionality of §8(3), we said with respect to limitations placed upon employers' right to discharge by that section that 'the [employer's] true purpose is the subject of investigation with full opportunity to show

> the facts.' In another case the same day we found the employer's 'real motive' to be decisive and stated that 'the act permits a discharge for any reason other than union activity or agitation for collective bargaining with employees.' Courts of Appeals have uniformly applied this criteria, and writers in the field of labor law emphasize the importance of the employer's motivation to a finding of violation of this section. Moreover, the National Labor Relations Board in its annual reports regularly reiterates this requirement in its discussion of §8(a)(3). For example, a recent report states that 'upon scrutiny of all the facts in a particular case, the Board must determine whether or not the employer's treatment of the employee was motivated by a desire to encourage or discourage union membership or other activities protected by the statute.' "

The decisions of the Courts of Appeals are to the same effect. It will suffice to quote one case, as illustrative.

> "So far as the National Labor Relations Act, 29 U.S.C.A. §151 *et seq.*, goes, the employer may discharge, or refuse to reemploy for any reason, just or unjust, except discrimination because of union activities and relationships. In the matters now concerning us, *the controlling and ultimate fact question is the true reason which governed the very person who discharged or refused to reemploy in each instance.*" (Emphasis added)
>
> *N.L.R.B. v. Tex-O-Kan Flour Mills Co.*, (CCA 5th, 1941), 122 F. 2d 433, 438.

The *Tex-O-Kan* case was cited on this point with approval in *N.L.R.B. v. Stafford* (CA 8th, 1953), 206 F. 2d 19, 23.

The foregoing cases recognize the fundamental distinction between interfering with, restraining or coercing employees in the exercise of the rights guaranteed them by the Act in violation of Section 8(a)(1), and discriminatory

discharge of an employee to encourage or discourage union membership in violation of Section 8(a)(3). In the former case the policy of the Act is to leave the employees free to choose their bargaining representative uncoerced by any conduct which they might reasonably believe is attributable to the employer. In the latter case the policy of the Act is to protect an employee from discharge for the purpose of discouraging union activity, but not to protect him from discharge for any other reason; and the question necessarily becomes the motive animating the employer's representative who actually caused the discharge. It is true that his motive may be shown by extrinsic circumstances having a reasonable tendency to prove his state of mind. It cannot, however, be shown by circumstances tending to prove only someone else's state of mind.'

A reading of the Board's decision and the Court's opinion clearly shows that the finding of wrongful discharge rests primarily, if not exclusively, on the anti-union remarks of the department head DuFour, who had no authority over the discharged employees. The Board has found that petitioner is not liable for these remarks. It has failed to find that these remarks in any way characterized the motivation of the regional manager, district manager, store manager and assistant manager, who participated in the decisions to discharge. It has contented itself with charging these persons as a matter of law with DuFour's private intentions.

We submit that this attempt to convert a question of fact into a question of law leaves the order and decree below without support in the Record, and contrary to the well considered decisions of this Court and Courts of Appeals in other circuits. It presents a question of great importance in the construction of the National Labor Relations Act, as amended, which should be decided by this Court.

II. The National Labor Relations Board may not lawfully base a finding of wrongful discharge, in violation of Section 8(a)(3) of the National Labor Relations Act, on the knowledge and intent shown by the anti-union remarks of a subordinate department head who contemporaneously voted as a non-supervisory employee on petition of the charging union in a consent election conducted by the Board.

It is abundantly clear from the Board's decision and the lower Court's opinion that the finding of intent to discharge for union activity in violation of Section 8(a)(3) of the Act was based primarily on DuFour's utterances in private conversations. Contemporaneously with these utterances DuFour voted as an employee in an election conducted by the Board's Regional Director. The Board has found that under these circumstances he did not represent management in making the remarks, but it has nevertheless charged management with his intentions. In affirming the Board, the Court below expressly held that "the fact that DuFour voted in the election has no necessary connection with his also being an agent of management for purposes of Section 8(a)(3)." (App. 18-A). Thus the same employee at the same time and by the same verbal acts becomes a non-supervisor for the purpose of talking and voting, but a supervisor for the purpose of thinking the thoughts expressed by his words.

This holding is directly contrary to the decision of the Third Circuit in *N.L.R.B.* v. *James H. Matthews & Co.* (CCA 3rd 1946) 156 F. 2d 706. It raises in an acute form a problem which Mr. Justice Douglas foresaw in his dissenting opinion in *Packard Motor Car Co.* v. *N.L.R.B.* (1947), 330 U.S. 485, 497. And it emasculates Sections 2(3) and 14(a) of the amended Act (App. 1-A and 5-A), by which a clear line is drawn between management and

employee. Under those sections the exercise of rights as an "employee" has been since 1947 wholly inconsistent with simultaneous responsibility as a "supervisor."

The applicable facts are undisputed, and are recognized in the Board's opinion (R. 388-389). The union's Petition for Consent Election filed on July 16, 1954 (G.C. Ex. 2, R. 2) described the unit as including "department managers" in petitioner's Binghamton store. The particularity with which the petition described the employees included and excluded leaves no doubt that the union was fully acquainted with the personnel involved. The certified list of eligible voters (G.C. Ex. 4, R. 10) listed 28 employees described as "department heads," including DuFour and Felker, out of a total of 83 in the bargaining unit. It was stipulated between petitioner, the General Counsel and the union that the list "was agreed upon by the union and the employer and used by the Board as the eligibility list for said election." (R. 42-43). The election was held on August 17, 1954 (R. 43) and DuFour voted in it without challenge (R. 303). Subsequently the Regional Director issued a tally of ballots showing that the union had won (G.C. Ex. 9, R. 13), and on August 25, 1954, a certification of the union as the bargaining agent (G.C. Ex. 10; not printed). All of the remarks by DuFour concerning which complaint is made in this case were made between the time that the union filed its petition and the issuance of the certification.

Under this state of facts, the following questions are presented:

First, can petitioner be held responsible in any way for words spoken in private conversation by an employee eligible to vote in a Board election, when those words are admittedly not regarded by their hearers as coercive?

Second, is a union which has petitioned the Board to hold an election in a unit including retail store department heads, and which has agreed on a list of eligible voters containing the name of DuFour as a department head, estopped to deny that at the time of the petition and the election DuFour was acting as a protected employee in expressing his opinion on union matters?

Third, did the use by the Regional Director of an eligibility list including department heads and the certification of the results of the election based thereon constitute a ruling by the Board that the persons who voted were eligible employees, at least until such time as the Board took steps to set aside that finding in some lawful manner?

The broad sweep of employees' rights under Section 8(c) of the amended Act and the First Amendment to the Constitution is illustrated by the recent case of *N.L.R.B.* v. *Babcock & Wilcox Company* (1956), 351 U.S. 105, where this court said at page 113:

> "No restriction may be placed on the employees' right to discuss self-organization among themselves, unless the employer can demonstrate that a restriction is necessary to maintain production or discipline."

In the present case it has not been argued—and it could not plausibly be argued—that petitioner could impose censorship on DuFour or any eligible employee to "maintain production or discipline." Petitioner therefore had no right to interfere with DuFour's remarks. *It is intolerable that the employer should be held liable for words which it had absolutely no power to control.* Yet, that is the inevitable result of the decisions below.

Prior to the enactment of the Labor Management Relations Act in 1947 such a problem did exist. It arose from the fact that this Court felt compelled by the language

of the National Labor Relations Act to hold that a foreman could be both a representative of management and an employee entitled to organize under the protection of the Act—though it was not contended in that case that he occupied both positions at the same moment and by the same act. *Packard Motor Car Company* v. *N.L.R.B.* (1947), 330 U.S. 485. The difficulties to be expected were well summarized by Mr. Justice Douglas in his dissenting opinion, 330 U.S. at p. 497:

> "If foremen were to be included as employees under the Act, special problems would be raised—important problems relating to the unit in which the foremen might be represented. Foremen are also under the Act as employers. That dual status creates serious problems. An act of a foreman, if attributed to the management, constitutes an unfair labor practice; the same act may be part of the foreman's activity as an employee. In that event the employer can only interfere at his peril."

One of the primary purposes of the Taft-Hartley Act was to resolve this difficulty and to overrule the decision in the *Packard* case. The protection of the Act is limited to "employees." Under amended Section 2(3) the term "employee", as used in the Act, "shall not include * * * any individual employed as a supervisor." The intention thus expressed in the Act's language also appears in the "comprehensive statement" made by Senator Taft at the time the proposed law came before the Senate. On this point he said, 93 Cong. Rec. 3836:

> "It is felt very strongly by management that foremen are part of management; that it is impossible to manage a plant unless the foremen are wholly loyal to the management. We tried various in-between steps, but *the general conclusion was that they must either be a part of management or a part of the employees.* It was proposed that there be separate foremen's unions not affiliated with the men's unions, but

> it was found that that was almost impossible; that there was always an affiliation of some sort; that foremen, in order to be successful in a strike, must have the support of the employees' union. A plant can promote other men to be foremen if necessary. The tie-up with the employees is inevitable. *The committee felt that foremen either had to be part of management and not have any rights under the Wagner Act, or be treated entirely as employees*, and it was felt that the latter course would result in the complete disruption of discipline and productivity in the factories of the United States." (Emphasis added.)

The decisions below cannot be reconciled with this purpose of the amended Act. Under them DuFour is simultaneously a member of the bargaining unit who is entitled to participate in the employees' deliberations concerning conditions of employment, and a member of management for whom petitioner is responsible. He is entitled to free speech on union matters under Section 8 (c) of the Act and the First Amendment, but his exercise of this right in private conversations is held to impose legal liability on petitioner. His conduct is thus at the same time both protected and unlawful. Furthermore, petitioner is compelled to bargain with a unit containing a person adjudged by the Board to be a supervisor, contrary to Section 14(a) of the Act. In short, the decisions represent a complete negation of the division between management representatives and employees that Senator Taft said was a primary purpose of his bill. The practical result will be to discourage consent elections, because the agreement that a given individual shall be considered as an employee will henceforth be used by the union when advantageous and repudiated when disadvantageous, as in the present case.

Not only is the present decision contrary to the intention of the Labor Management Relations Act, but it is contrary

to the decision of the Third Circuit in *N. L. R. B.* v. *James H. Matthews & Co.*, (CCA 3rd 1946), 156 F. 2d 706, on substantially identical facts. In that case, as here, a consent election was held under the supervision of the Board's regional representative, and no objection was made to the inclusion in the unit of the three assistant foremen later alleged to be supervisors. In spite of this absence of objection, the union subsequently brought charges of unfair labor practices based in part on certain anti-union statements made by these three employees. The court modified the Board's order so as to eliminate the charges based upon these statements, saying (156 F. 2d at p. 709):

> "*We cannot protect the right of these voters to discuss merits or demerits of a particular proposed bargaining agent and in the same breath declare the employer responsible, under the Act, for what these eligible voters say to each other.* Of course, it is true that the Board has responsibility for the administration of the National Labor Relations Act and that private individuals cannot interfere with the Board's exercise of its statutory function. But the arrangements for this election were carried on under Board auspices. The men concerned were on the list of voters. We do not think that after the election the Company can be held responsible for what some of those voters have said to each other on the theory that their statements constitute unfair labor practice." (Emphasis added.)

There are two ways by which this shocking result may be avoided. The Court should, we submit, hold that the union is estopped to deny that DuFour was an employee. The Court should also hold that the Regional Director's certification of the result of the election, based on the votes of DuFour and the 27 other department heads, constituted a ruling by the Board as to their status which is binding until set aside.

The Board has obliquely recognized the justice of petitioner's first contention by assuming *arguendo* that the union is estopped (R. 389). But even if the union were not estopped, it is still true that the Board made a determination of DuFour's status as an "employee" on which petitioner was both entitled and obligated to rely. We admit that the Board may at any time set aside such determination *for the future*. Our contention is that it may not set aside such determination *retroactively*.

The decision below establishes a completely unworkable rule, which is contrary to the intent of the Act, contrary to the First Amendment, and contrary to the well considered opinion of the Court of Appeals for the Third Circuit in the *Matthews* case. It presents an important problem in the interpretation and administration of the labor laws which should be decided by this Court.

III. The National Labor Relations Board's finding of wrongful discharge, in violation of Section 8(a)(3) of the National Labor Relations Act, is not supported by substantial evidence on the Record considered as a whole, because it ignores the actual intent of Petitioner's Management and is based on a holding that the undisputed facts advanced by Petitioner as economic grounds for the discharges are not in the opinion of the Board adequate.

In order to justify a finding of wrongful discharges and an order of reinstatement under Section 8(a)(3) of the Act, the General Counsel must show by substantial evidence that the management personnel responsible for the discharges (1) had knowledge of the union activity of the discharged employees and (2) intended to discharge them on account of such activity. For the reasons set forth above, the knowledge and intent must be that of the persons con-

cerned with the discharges, not of some alleged supervisory employee who had no connection with them.

The opinion of the Court below is grounded on a contrary assumption. The Court holds that the requisite knowledge and intent may be supplied by imputing to petitioner's management the state of mind of a person who was assumed by all concerned to be a non-management employee, but who is later found by the Board to be a supervisor. To this proposition the Court devotes the first and greater part of its opinion (App. 12-A to 19-A).

As a secondary alternative, the Court alleges that there was other evidence in the record to support the Board's refusal to accept petitioner's evidence of economic grounds for the discharges (App. 19-A). It is noteworthy that the principal argument originally advanced by the Court as to Felker was based on a misunderstanding of the Record, and it was withdrawn after the error was pointed out in a petition for rehearing (Compare App. 19-A with App. 24-A). In its amended opinion, the Court admits that Felker had been found unsatisfactory prior to the commencement of any union activity, but concludes that this fact was nullified by his appointment as head of the toy department in July 1954 (App. 24-A). This conclusion ignores the undisputed facts that Felker's appointment in the toy department was an annual event, to compensate for seasonal decline of sales in his own department (R. 113, 138-141), and that when he was thus reappointed on July 1, 1954 the store had not yet received orders to eliminate his job (R. 233).

The Court's alternative basis for a finding of wrongful discharge in each case finally comes down to the abruptness of the discharges and their timing (App. 20-A and 24-A). Lacking affirmative evidence of illegal motivation, the court

thus ultimately relies on disapproval of petitioner's personnel policy. That is not enough. The very case cited by the Court below, *E. Anthony & Sons* v. *N. L. R. B.*, (C.A. D.C. 1947) 163 F. 2d 22, demonstrates the failure of the record here to support a Sec. 8(a)(3) violation. In the *Anthony* case the court found actual knowledge by management of the employees' union activities, management espionage on such activities, and strong opposition to the union by company officials, in addition to the abruptness of the discharges. None of these additional facts exists in this case.

We are aware of the burden placed upon us in arguing here the lack of substantial evidence to support the award, after an unfavorable decision by the Court of Appeals. We believe, however, that the present is one of the cases, admittedly few, where the substantial evidence rule "appears to have been misapprehended or grossly misapplied." *Universal Camera Corp.* v. *N. L. R. B.* (1951), 340 U.S. 474, 491.

The Court below has sustained the Board only by substituting imputations in place of factual findings of knowledge and intent. We submit that certiorari should be granted so that this Court may determine for itself the sufficiency of the evidence to support a finding of wrongful discharge.

IV. The National Labor Relations Board's finding of interference, restraint and coercion, in violation of Section 8(a)(1) of the National Labor Relations Act, is not supported by substantial evidence on the record considered as a whole, because it is based on two joking or casual inquiries which were clearly non-coercive.

In addition to the finding of wrongful discharge, the Board and the Court below also found interference, re-

straint and coercion in violation of Section 8(a)(1) of the Act. Both the Board and the Court expressly based this finding on store manager Rumble's questioning of employees Shoudy, Dino and Marold (R. 401; App. 20-A and 24-A). The two incidents relied on may be briefly described.

The entire description of the incident involving Shoudy and Dino is contained in the following testimony by Shoudy (R. 199):

> "As I remember it, Mr. Dino and I were in the department and Mr. Rumble walked up to us and in a casual manner said to us, 'What do you hear about the union?' And I turned to him and I said, 'Not much,' and he said, 'Well have you been to any meetings?' I said, 'Oh, one or two. Why?' And he just asked me; he says, 'Oh, I was just curious as to what went on.' I said, 'We just talked about the good and bad working conditions of the store and what the union can do to help them.' Then he says, 'Well, do you think they can do enough for you to join?' I says, 'I haven't decided.' And that ended it."

The other incident was described by Dorothy Marold in her testimony. She said that she walked into Mr. Rumble's office and "he said something like this: 'Did you join the union,' or 'What do you know about the union,' or something to that effect." (R. 194). She testified that she did not answer and continued: "He said, 'Do you mean to say they haven't asked you,' and I said, 'No, they didn't.' " She further testified: "He said it rather jokingly, like he might have been talking about it to someone else, at least that is the way I took it." (R. 195).

These two incidents, plus the alleged wrongful discharges of Felker and Witter *after the election*, are the entire basis for the alleged Section 8(a)(1) violation.

We submit that the use of these casual remarks to support a finding of Section 8(a)(1) violation is squarely contrary to the provision of Section 8(c) that the expressing of any views "shall not constitute *or be evidence* of an unfair labor practice" if they contain no threat or promise of benefit. The statutory language originated in HR 3020, concerning which the House Committee said (House Report No. 245, 80th Cong., First Session, p. 33):

> "This means that a statement may not be used against the person making it unless it, standing alone, is unfair within the express terms of Sections 7 and 8 of the amended Act."

Such use of casual inquiries is directly contrary to prior decisions of the Courts of Appeals construing the amended Act. Typical of them is *N. L. R. B.* v. *Associated Dry Goods Corp.*, (CA 2d 1954) 209 F. 2d 593, where the court said, page 595:

> "In this Circuit the case of *N. L. R. B.* v. *Montgomery Ward & Co.*, 192 F. 2d 160, holds in effect that an employer may make inquiry of employees during the organization campaign, provided such inquiry and subsequent discussion contains no threat or promises. We adhere to that decision, which is supported by the opinions in *Wayside Press, Inc.* v. *N. L. R. B.*, 9 Cir. 206 F. 2d 862; *N. L. R. B.* v. *England Bros.*, 1 Cir., 201 F. 2d 395; *N. L. R. B.* v. *Arthur Winer, Inc.*, 7 Cir., 194 F. 2d 370, and cases cited therein."

The decree below, finding petitioner guilty of a violation of Section 8(a)(1) of the Act, represents a gross perversion of the Act's intent. We respectfully submit that certiorari should be granted to correct the misconstruction thus placed by the Board and the Court of Appeals on a vital portion of the statute.

CONCLUSION

Wherefore, petitioner respectfully prays that a writ of certiorari issue to review the decree entered by the Court of Appeals for the Second Circuit in the above entitled cause.

Respectfully submitted,

CHARLES J. BARNHILL
DAVID L. DICKSON
619 West Chicago Avenue
Chicago, Illinois.

T. W. MADDEN
73 Varick Street
New York, New York
Attorneys for Petitioner.

APPENDIX

A. Constitutional Provision, Statutes and Regulations Involved

First Amendment to the Constitution of the United States

"Congress shall make no law * * * abridging the freedom of speech, * * *."

National Labor Relations Act, as amended by the Labor Management Relations Act, 1947 (49 Stat. 449, 61 Stat. 136; 29 USC §151 *et seq.*)

Section 2(3) (29 USC §152(3))

"The term 'employee' * * * shall not include * * * any individual employed as a supervisor, * * *."

Section 7 (29 USC §157)

"Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 158 (a)(3) of this title."

Section 8(a) (29 USC §158(a))

"It shall be an unfair labor practice for an employer—

"(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 157 of this title;

* * *

"(3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization: * * *."

Section 8(c) (29 USC §158(c))

"The expressing of any views, argument, or opinion, or the dissemination thereof, whether in written, printed, graphic or visual form, shall not constitute or be evidence of an unfair labor practice under any of the provisions of this subchapter, if such expression contains no threat of reprisal or force or promise of benefit."

Section 9(b) (29 USC §159(b))

"The Board shall decide in each case whether, in order to assure to employees the fullest freedom in exercising the rights guaranteed by this subchapter, the unit appropriate for the purposes of collective bargaining shall be the employer unit, craft unit, plant unit, or subdivision thereof: * * *."

Section 9(c) (29 USC §159(c))

"(1) Whenever a petition shall have been filed, in accordance with such regulations as may be prescribed by the Board—

"(A) by an employee or group of employees or any individual or labor organization acting in their behalf alleging that a substantial number of employees (i) wish to be represented for collective bargaining and that their employer declines to recognize their representative as the representative defined in subsection (a) of this section, or (ii) assert that the individual or labor organization, which has been certified or is being currently recognized by their employer as the bargaining representative, is no longer a representative as defined in subsection (a) of this section; or

"(B) by an employer, alleging that one or more individuals or labor organizations have presented to him a claim to be recognized as the representative defined in subsection (a) of this section; the Board shall investigate such petition and if it has reasonable cause to believe that a question of representation affecting commerce exists shall provide for an appropriate hearing upon due notice. Such hearing may be conducted by an officer or employee of the regional office, who shall not make any recommendations with respect thereto. If the Board finds upon the record of such hearing that such a question of representation exists, it shall direct an election by secret ballot and shall certify the results thereof."

* * * *

"(4) Nothing in this section shall be construed to prohibit the waiving of hearings by stipulation for the purpose of a consent election in conformity with regulations and rules of decision of the Board."

* * * *

Section 10(b) (29 USC §160(b))

"Whenever it is charged that any person has engaged in or is engaging in any such unfair labor practice, the Board, or any agent or agency designated by the Board for such purposes, shall have power to issue and cause to be served upon such person a complaint stating the charges in that respect, and containing a notice of hearing before the Board or a member thereof, or before a designated agent or agency, at a place therein fixed, not less than five days after the serving of said complaint: * * *."

Section 10(e) (29 USC §160(e))

"The Board shall have power to petition any United States Court of Appeals (including the United States Court of Appeals for the District of Columbia), or if all the United States courts of appeals to which application may be made are in vacation, any United States

district court, within any circuit or district, respectively, wherein the unfair labor practice in question occurred or wherein such person resides or transacts business, for the enforcement of such order and for appropriate temporary relief or restraining order, and shall certify and file in the court a transcript of the entire record in the proceedings, including the pleadings and testimony upon which such order was entered and the findings and order of the Board. Upon such filing, the court shall cause notice thereof to be served upon such person, and thereupon shall have jurisdiction of the proceeding and of the question determined therein, and shall have power to grant such temporary relief or restraining order as it deems just and proper, and to make and enter upon the pleadings, testimony, and proceedings set forth in such transcript a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board. No objection that has not been urged before the Board, its member, agent, or agency, shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances. The findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall be conclusive. If either party shall apply to the court for leave to adduce additional evidence and shall show to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for the failure to adduce such evidence in the hearing before the Board, its member, agent, or agency, the court may order such additional evidence to be taken before the Board, its members, agent, or agency, and to be made a part of the transcript. The Board may modify its findings as to the facts, or make new findings, by reason of additional evidence so taken and filed, and it shall file such modified or new findings, which findings with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall be conclusive, and shall

file its recommendations, if any, for the modification or setting aside of its original order. The jurisdiction of the court shall be exclusive and its judgment and decree shall be final, except that the same shall be subject to review by the appropriate circuit court of appeals if application was made to the district court as hereinabove provided, and by the Supreme Court of the United States upon writ of certiorari or certification as provided in sections 346 and 347 of Title 28."

Section 14(a) (29 USC §164(a))

"Nothing herein shall prohibit any individual employed as a supervisor from becoming or remaining a member of a labor organization, but no employer subject to this subchapter shall be compelled to deem individuals defined herein as supervisors as employees for the purpose of any law, either national or local, relating to collective bargaining."

Code of Federal Regulations, Title 29—*Labor, Chapter* 1. *National Labor Relations Board, Part* 102—*Rules and Regulations, Series* 6

Section 102.5

"The term 'regional director' as used in this part shall mean the agent designated by the Board as regional director for a particular region . . ."

Section 102.54(b)

"Where a petition has been duly filed, the employer and any individuals or labor organizations representing a substantial number of the employees involved may, with the approval of the regional director, enter into an agreement providing for a waiver of hearing and a consent election leading to a determination by the Board of the facts ascertained after such consent election, if such a determination is necessary. Such

agreement shall also include a description of the appropriate bargainning unit, the time and place of holding the election, and the payroll to be used in determining which employees within the appropriate unit shall be eligible to vote. Such consent election shall be conducted under the direction and supervision of the regional director. The method of conducting such election and the post-election procedure shall be consistent with that followed by the regional director in conducting elections pursuant to §§102.61 and 102.62."

Section 102.61

"Unless otherwise directed by the Board, all elections shall be conducted under the supervision of the regional director in whose region the proceeding is pending. All elections shall be by secret ballot. Whenever two or more labor organizations are included as choices in an election, either participant may, upon its prompt request to, and approval thereof by, the regional director, whose decision shall be final, have its name removed from the ballot. Any party may be represented by observers of his own selection, subject to such limitations as the regional director may prescribe. Any party and Board agents may challenge, for good cause, the eligibility of any person to participate in the election. The ballots of such challenged persons shall be impounded. Upon the conclusion of the election, the regional director shall cause to be furnished to the parties a tally of the ballots. Within 5 days after the tally of ballots has been furnished, any party may file with the regional director four copies of objections to the conduct of the election or conduct affecting the results of the election, which shall contain a short statement of the reasons therefor. Such filing must be timely whether or not the challenged ballots are sufficient in number to affect the results of the election. Copies of such objections shall immediately be served upon each of the other parties by the party filing them, and proof of service shall be made.

"If no objections are filed within the time set forth in this section, if the challenged ballots are insufficient in number to affect the result of the election, and if no runoff election is to be held pursuant to §102.62, the regional director shall forthwith issue to the parties a certification of the results of the election, including certification of representatives where appropriate, with the same force and effect as if issued by the Board, and the proceeding will thereupon be closed.

"If objections are filed to the conduct of the election or conduct affecting the results of the election, or if the challenged ballots are sufficient in number to affect the result of the election, the regional director shall investigate such objections, challenges, or both, and shall prepare and cause to be served upon the parties a report on challenged ballots, objections, or both, including his recommendations, which report, together with the tally of the ballots, he shall forward to the Board in Washington, D.C. Within 10 days from the date of issuance of the report on challenged ballots, objections, or both, any party may file with the Board in Washington, D.C. seven copies of exceptions to such report. Immediately upon the filing of such exceptions, the party filing the same shall serve a copy thereof upon each of the other parties, and shall file a copy with the regional director. Proof of service shall be made to the Board. If no exceptions are filed to such report the Board upon the expiration of the period for filing such exceptions, may decide the matter forthwith upon the record, or may make other disposition of the case.

"The report on challenged ballots may be consolidated with the report on objections in appropriate cases.

"If exceptions are filed, either to the report on challenged ballots, objections, or both if it be a consolidated report, and it appears to the Board that such exceptions do not raise substantial material issues with respect to the conduct or results of the election, the

Board may decide the matter forthwith upon the record, or may make other disposition of the case. If it appears to the Board that such exceptions raise substantial and material factual issues, the Board may direct the regional director or other agent of the Board to issue and cause to be served upon the parties, a notice of hearing on said exceptions before a hearing officer. The hearing shall be conducted in accordance with the provisions of §§ 102.56, 102.57, and 102.58, insofar as applicable. Upon the close of the hearing, the agent conducting the hearing, if directed by the Board, shall prepare and cause to be served upon the parties a report resolving questions of credibility, and containing findings of fact, and recommendations to the Board, as to the disposition of the challenges or objections, or both, if it be a consolidated report. The agent conducting the hearing shall forward to the Board in Washington, D.C., the notice of hearing, motions, rulings, orders, stenographic report of the hearing, stipulations, exceptions, documentary evidence, all of which, together with the objection to the conduct of the election or conduct affecting the results of the election, the report on such objections, the report on challenged ballots, and exceptions to the report on objections or to the report on challenged ballots, and the record previously made, together with his report, if any, shall constitute the record in the case. In any case in which the Board has directed that a report be prepared and served; any party may within 10 days from the date of issuance of the report on challenged ballots, objections, or both, file with the Board in Washington, D.C., seven copies of exceptions to such report. Immediately upon the filing of such exceptions, the party filing the same shall serve a copy thereof upon each of the other parties, and shall file a copy with the regional director. Proof of service shall be made to the Board. If no exceptions are filed to such report the Board, upon the expiration of the period for filing such exceptions, may decide the matter forthwith upon the record, or may make other disposition of the case. The Board shall thereupon proceed pursuant to § 102.60.

"In any such case in which the Board, upon a ruling on challenged ballots, has directed the regional director to open and count such ballots and to issue a revised tally of ballots, and no objection to such revised tally is filed by any party within 5 days after the revised tally of ballots has been furnished, the regional director shall forthwith issue to the parties certification of the results of the election, including certification of representatives where appropriate, with the same force and effect as if issued by the Board. The proceeding shall thereupon be closed."

Code of Federal Regulations, Title 29—*Labor, Chapter* I *National Labor Relations Board, Part* 101—*Statement of Procedure*

Section 101.18

"The Board has devised and makes available to the parties two types of informal consent procedures through which representation issues can be resolved without recourse to formal procedures. These informal arrangements are commonly referred to as consent election agreement, followed by Regional Director's certification, and consent election agreement, followed by Board certification. Forms for use in these informal procedures are available in the Regional Offiices."

• • • •

"(b) The consent election agreement followed by a Board determination provides that disputed matters following the agreed upon election, if determinative of results shall be the basis of a formal decision by the Board instead of an informal determination by the Regional Director. Thus that it provided that the Board, rather than the Regional Director, makes the final determination of questions raised concerning eligibilty, challenged votes and objections to the conduct of the election. Thus, if challenged ballots are sufficient in number to affect the results of the count, the

Regional Director conducts an investigation and issues a report on the challenges instead of ruling thereon. Similarly, if objections to the conduct of the election are filed within 5 days after issuance of the tally of ballots, the Regional Director likewise conducts an investigation and issues a report instead of ruling upon the validity of the objections. In either event, the Regional Director's report is served upon the parties, who may file exceptions thereto within 5 days with the Board in Washington. The Board then reviews the entire record made and may, if a substantial issue is raised, direct a hearing on the challenged ballots or the objections to the conduct of the election. Or, the Board may, if no substantial issues are raised, affirm the Regional Director's report and take appropriate action in termination of the proceedings. If a hearing is held upon the challenged ballots or objections, all parties are heard and if directed by the Board, a report containing findings of fact and recommendations as to the disposition of the challenges or objections, or both, and resolving issues of credibility, is issued by the hearing officer and served upon the parties who may file exceptions thereto within 10 days with the Board in Washington, D.C. The record made on the hearing is reviewed by the Board with the assistance of its legal assistants and a final determination made thereon. If the objections are found to have merit, the election results may be voided and a new election conducted under the supervision of the Regional Director. If the union has been selected as the representative, the Board or the Regional Director, as the case may be, issues a certification and the proceeding is terminated. If upon a decertification or employer petition the union loses the election the Board or the Regional Director as the case may be certifies that the union is not the chosen representative."

B. Opinions and Decree of the Court of Appeals

Original Opinion filed March 18, 1957 (R. 412-421):

(Those portions of the original Opinion which were modified or deleted by the Opinion on Rehearing are italicized.)

In the United States Court of Appeals
for the Second Circuit
Docket No. 24251
National Labor Relations Board,
Petitioner,

-v-

Montgomery Ward & Co., Inc.,
Respondent.

Before:

CLARK, *Chief Judge*,
LUMBARD AND WATERMAN, *Circuit Judges*.

The National Labor Relations Board petitions, pursuant to 29 U.S.C.A. §160(e), for enforcement of its order, 115 N.L.R.B. 92, directing respondent, Montgomery Ward & Co., Inc., to cease and desist from interfering with its employees at its Binghamton, New York store in the exercise of their rights to organize and bargain collectively under §7 of the National Labor Relations Act and to reinstate with back pay two employees discharged for union activity. Order of enforcement granted.

Theophil C. Kammholtz, General Counsel, Stephen Leonard, Associate General Counsel, Marcel Mallet-Prevost, Assistant General Counsel, Samuel M. Singer and Florian J. Bartosic, Attorneys, National Labor Relations Board, Washington, D.C., *for petitioner.*

Charles J. Barnhill and David L. Dickson, Chicago, Ill., and T. W. Madden, New York, N.Y., *for respondent.*

LUMBARD, *Circuit Judge*:

The National Labor Relations Board petitions this court for enforcement of its order of February 29, 1956, that Montgomery Ward (1) cease and desist from (a) discouraging its employees from union membership, by discriminatory hire, discharge and reinstatement; (b) interrogating employees about their union membership, activities or views, and (c) interfering in any manner with their rights to self organization and collective bargaining, in violation of § 8(a)(1) and § 8(a)(3),[1] National Labor Relations Act, 29 U.S.C.A. §158; (2) reinstate employees Frank Felker and Irene Witter, whom the Board found to have been discharged for union activity in violation of §8(a)(3); and (3) post the usual notices of compliance. In its decision, the Board also found that Montgomery Ward had interfered with, restrained, and coerced its employees in violation of §8(a)(1) by store manager Rumble's questioning of certain employees as to union activity.

The central issue in this case is the motive for the discharge of Frank Felker and Irene Witter. The Board, affirming the Trial Examiner, found that the discharge was

---

[1] Sec. 8. (a) It shall be an unfair labor practice for an employer—

(1) to interfere with, restrain, or coerce, employees in the exercise of the rights guaranteed in section 7;

* * * * * * *

(3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization; * * *

for union activity, and rejected Montgomery Ward's claim that it was for reasons of efficiency and economy.

We grant enforcement of the Board's order as the record discloses substantial evidence to support the findings of the Board.

In addition to its mail order business, Montgomery Ward operates many retail stores, including one in Binghamton, New York. A basic store chart sets up the organization of each store. The store manager may hire extra or temporary help only to the extent of sales above a "basic" amount. The Trial Examiner found that the "basic" for the Binghamton store was revised twice a year: the revision most pertinent to this case is that of July 1954.

Felker, an excellent salesman who had won numerous prizes and rewards from the company, had been with Montgomery Ward from 1942 to the date of discharge except for a brief period in 1953 after which he returned to his former position at an increase in salary. He was in charge of the farm equipment department of the Binghamton store at the time of his discharge; on July 1 he was asked to take over the toy department as well.

Witter had no fixed assignment but helped out in various departments of the store, working in about twenty different capacities at one time or another. She worked steadily for Montgomery Ward from 1950 until her discharge on August 19, 1954, two days after the election.

In February 1954, Retail Clerks International Association, Local No. 1687, AFL, filed a petition for certification. By June the Union was engaged in organizing Montgomery Ward's Binghamton store and in an election on August 17, 1954 it succeeded in becoming the bargaining representative. Felker and Witter, the two discharged employees,

were strong advocates of the Union. Both solicited members, particularly during August at the height of the union organizing campaign. Felker was a particularly active solicitor, going so far as to advance money to one fellow-employee to enable him to join the Union.

A few weeks prior to the election, a department head named DuFour, who at the hearing admitted his strong anti-union sentiments, told Felker that "the Company knows all of those that (*sic*) are in favor of the Union and they will lose their jobs." At another time he told Felker that if the Union won, Montgomery Ward would close the store. DuFour also told Witter that if the Union won, she would lose her job because of her union activities. About two weeks before the election, he told an employee named Bright that the company knew who the union people were, and that if the Union won, certain people including Felker, would be automatically squeezed out. This could be done, DuFour is reported by Bright to have said, by "put[ting] two jobs—two departments together and eliminate that job."

In addition several other employees testified that store manager Rumble asked them whether they had joined the Union.

On Monday, August 16, Felker started a week's vacation, but returned on August 17 to vote in the election. On his return to work on August 23 he was told that he had been discharged by order from the New York office. In place of his $70 a week position he was offered a part-time job at $20 a week which offer he refused. About ten days later Felker asked for his dismissal pay from store manager Rumble who said he could not give it to him, adding "Frank, I hope you don't hold anything against me. As far as I am concerned, there was nothing wrong with your work."

Four days after Felker was discharged, Montgomery Ward advertised for "full or part-time help." About a month after the discharge, Montgomery Ward hired a replacement for Felker at $50 per week plus commissions.

Montgomery Ward dismissed Witter on August 19, two days after the election. The day of Witter's dismissal, DuFour had commented on the fact that she was wearing a union button and said, "I wouldn't have anything to do with the Union or anybody in it, if I were you." At 6:00 that evening, she was told she was being released because she was on a "non-basic payroll" and couldn't be carried any longer, presumably because the store was not earning enough over the basic requirements. Store manager Rumble later testified she was discharged because her work was unsatisfactory. About two weeks after her discharge Montgomery Ward hired a replacement for Witter.

In explanation of the discharge of Felker, Montgomery Ward contended that some time between March and June it had been decided by the regional operating manager and the district manager that the farm equipment and toy departments should be combined with the paint department, because it was concluded that the sales for the farm equipment department during the coming half-year would fall off. This amalgamation eliminated one department head and the Company claimed it was necessary to choose between McGraw, who headed the paint department and Felker. Since McGraw was a better all-around man, the Company decided it would discharge Felker, who was earning $70 per week plus commissions, and retain McGraw at $60 a week, allowing him an extra $20 a week out of basic for a part-time man.

The Company explained Witter's discharge on the ground that it was necessary to reduce the payroll and that Witter's shortcomings as an employee made her the appropriate person to cut.

The Trial Examiner found that Felker and Witter had been discharged not because of the revision in the basic store organization, but for their union activities. He also found that Rumble's questions as to union membership constituted an interference with the exercise of employee rights under §7, in violation of §8(a)(1), and that DuFour's questions and threats constituted coercion, also in violation of §8(a)(1).

The Board affirmed the decision as to Rumble, but held that because DuFour had voted in the representation election, he was probably considered by the employees as one of them rather than as part of management. Hence, DuFour's statements to them could not be considered as management coercion. However, the Board held that despite his voting in the election, his supervisory status could be considered in determining whether his knowledge and attitude could be imputed to Montgomery Ward in determining the motivation for the discharges. The Board thereupon found that he was a supervisor with power to hire and fire.

Montgomery Ward argues that a finding of a §8(a)(3) violation requires a specific finding as to the motive of the supervisory employees who actually did the firing and that in making this finding, DuFour's knowledge, attitude and statements could not be considered. If DuFour's role be disregarded, Montgomery Ward contends the Board's other findings fail to sustain its order.

Montgomery Ward rests its case against the use of DuFour's statements to establish its motive on two grounds:

1. The Board had held that because of DuFour's membership in the unit and his participation in the election, Montgomery Ward would not be held responsible for

DuFour's anti-union statements so as to hold the company liable for violation of §8(a)(1). It was therefore inconsistent to impute DuFour's knowledge and actions to the company to show a violation of §8(a)(3).

2. By agreement of the Union and Employer, and with the approval of the Regional Director of the National Labor Relations Board, DuFour was included in a unit of all employees except supervisors and voted in the election. The Board was therefore estopped from considering him as a supervisor and imputing any of his activities to Montgomery Ward.

We do not agree with these contentions.

We find nothing inconsistent in the Board's decision that DuFour's statements could not be used to charge Montgomery Ward with coercion and intimidation in violation of §8(a)(1) but could be used to determine Montgomery Ward's knowledge and attitude. The Board's theory that no §8(a)(1) charge could be grounded on DuFour's questions and threats was based on the fact that he was considered by the employees as one of them and not part of management. "Thus, [his statements] do not tend to intimidate them." These subjective employee reactions have no bearing on whether he actually was an agent of management, for he could easily have been very high in management circles without the other employees having any notion of this. DuFour's supervisory status is clear, and, regardless of how the employees reacted to DuFour's statements, his knowledge of union activities and statements as to employer motivation were properly imputed to Montgomery Ward.

Moreover, as the Board rightly concluded, the fact that DuFour was included in the bargaining unit and voted, with the approval of the Union and N.L.R.B. Regional

Director, does not estop the Board from considering his supervisory status, for neither the Board nor the Regional Director ever made a definitive determination of his status. The Regional Director merely approved the arrangement for the election as agreed to by the Union and the employer. It is most unlikely that such approval either did, or even could as a practical matter, involve any careful study of supervisory status. In many prior cases before the Board, it has held that it will not be estopped from inquiring into supervisory status by the approval of one of its Regional Directors, see, *e.g., The Steel Products Engineering Co.*, 103 N.L.R.B. 565, 576, (1953); *Valentine Sugars, Inc.*, 102 N.L.R.B. 113, 114 n. 3 (1953). This position seems to us to be entirely sound, especially where the fact and effect of voting have no necessary connection with the issues in the Board proceeding—as noted *supra*, the fact that DuFour voted in the election has no necessary connection with his also being an agent of management for purposes of §8(a)(3). *N. L. R. B.* v. *Jas. H. Mathews & Co.*, 156 F. 2d 706, 708-709 (3 Cir. 1946), cited by Montgomery Ward, is thus distinguishable for there the employer was charged, *inter alia*, with coercion in violation of §8(a)(1). On that issue, the Board found, as in the case now before us, that the supervisory employee's participation in the representation election was relevant in determining whether the other employees would consider the supervisor's statements as an attempt at employer coercion. Thus to hold that the Regional Director's approval estops the Board would be to ignore the realities of the situation.

Nor can the agreement between the Union and employer preclude either the Board from examining an employee's supervisory status, or the Union from bringing a complaint for discriminatory discharge based on such a supervisory

employee's knowledge and expression of employer attitudes. *Brewster Pateros Processors*, 73 N.L.R.B. 833, 834-35 (1947). Again, the fact that a supervisory employee votes in an election is not conclusive on the question of whether he is "an arm of management" in determining management's knowledge and motivation in a §8(a)(3) proceeding, and whether the Union consented to his voting is immaterial.

But the Board's finding of Montgomery Ward's motivation for the discharges does not rest solely on the evidence concerning DuFour's knowledge of Union activities and statements of employer intention which we find the Board is at liberty to impute to the company.

There was other evidence in the record to support the Board's refusal to adopt the explanation for the discharge adduced by the company.

As to Felker, Montgomery Ward contended that the amalgamation of the two departments, Felker's and McGraw's, in the interest of economy, was decided upon in June at the latest, and that Felker was an unsatisfactory employee. But in July Felker was asked to take over the toy department. If the decision to discharge him had been made in June, and on the ground alleged, it would seem that he should have been discharged then, rather than immediately after the successful election. Nor does any notice or warning of discharge seem to have been given. The abruptness of a discharge and its timing are persuasive evidence as to motivation, see E. Anthony & Sons v. N. L. R. B., 163 F. 2d 22, 26-27 (D.C. Cir. 1947), *particularly where another time—June—seems more appropriate if the Company's alleged reason were the real one. And, if in June his discharge was imminent, it does not seem plausible that in July he would be assigned to head another department. As to his incompetence, it is undisputed that he was an outstanding salesman.* The flaws in

his work as department head on which Montgomery Ward purports to rely, were carefully considered by the Board, which concluded that there was little substance to them. With this we agree.

Finally, if the purpose of Felker's discharge was to save money, it is difficult to understand why an advertisement for employees was inserted just a few days after the discharges, and why a new employee was soon hired to replace an outstanding salesman like Felker at a salary only $20 lower.

As to Witter, the suddenness of the discharge immediately after the election and the almost immediate replacement support the Board's finding. Montgomery Ward urges many instances of incompetence; none of them seemed to have any but a very slight basis.

Finally, the Board's finding that store manager's Rumble's questioning of the employees regarding their Union affiliations constituted sufficient interference in the particular factual setting of this case to charge Montgomery Ward with a violation of §8(a)(1), *does not seem to be disputed.*

We conclude that the Board's order is supported by substantial evidence and should be enforced.

Decree Enforcing an Order of the National Labor Relations Board entered April 5, 1957, (R. 434-437):

This cause came on to be heard upon the petition of the National Labor Relations Board to enforce its order dated February 29, 1956. The Court heard argument of respective counsel on January 11, 1957, and has considered the briefs and the transcript of record filed in this cause. On March 18, 1957, the Court, being fully advised in the premises, handed down its decision enforcing the said order. In conformity therewith it is hereby

Ordered, Adjudged And Decreed that the Respondent, Montgomery Ward & Co., Incorporated, Binghamton, New York, its officers, agents, successors and assigns, shall:

1. Cease and desist from:

(a) Discouraging membership in Retail Clerks International Association, Local Union No. 1687, AFL-CIO, or in any other labor organization of its employees, by discharging or refusing to reinstate any of its employees, or by discriminating in any other manner in regard to their hire or tenure of employment, or any term or condition of their employment.

(b) Interrogating its employees concerning their union membership, union activities, or views about Retail Clerks International Association, Local Union No. 1687, AFL-CIO, or any other labor organization, in a manner constituting interference, restraint or coercion in violation of Section 8(a)(1) of the National Labor Relations Act, as amended, (hereinafter referred to as the Act).

(c) In any other manner interfering with, restraining, or coercing its employees in the exercise of the right to self-organization, to form, join, or assist Retail Clerks International Association, Local No. 1687, AFL-CIO, or any other labor organization, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment, as authorized in Section 8(a)(3) of the Act.

2. Take the following affirmative action which the National Labor Relations Board has found will effectuate the policies of the Act:

(a) Offer to Frank J. Felker and Irene Gladys Witter immediate and full reinstatement to their former, or substantially equivalent positions, without prejudice to seniority or other rights and privileges previously enjoyed, and make them whole for any loss of pay they may have suffered by reason of the discrimination against them, in the manner provided in the section of the Intermediate Report of the Trial Examiner of the National Labor Relations Board, dated April 18, 1955, entitled "The Remedy."

(b) Preserve and make available to the Board, or its agents, upon request, for examination and copying, all payroll records, social security payment records, time cards, personnel records and reports, and all other records necessary to analyze the amounts of back pay due and the rights of employment under the terms of this Decree.

(c) Post at its store in Binghamton, New York, copies of the notice attached hereto and marked Appendix A. Copies of said notice, to be furnished by the Regional Director of the National Labor Relations Board, for the Third Region, Buffalo, New York, shall, after being duly signed by the Respondent, be posted by it immediately upon receipt thereof, and maintained by it for sixty (60) consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to insure that said notices are not altered, defaced, or covered by any other material.

(d) Notify the aforesaid Regional Director, in writing, within ten (10) days from the date of this Decree what steps the Respondent has taken to comply herewith.

Charles E. Clark
Judge, United States Court of Appeals for the Second Circuit

J. Edward Lumbard
Judge, United States Court of Appeals for the Second Circuit.

Opinion on Denial of Petition for Rehearing Filed April 15, 1957 (R. 438-439):

National Labor Relations Board,
Petitioner,

vs.

Montgomery Ward & Co., Inc.,
Respondent.

PETITION FOR REHEARING

Before CLARK, Chief Judge, LUMBARD and WATERMAN, Circuit Judges.

The petition for rehearing questions certain factual conclusions in the original opinion. Although upon re-examination of the record, we agree with some of the petitioner's contentions, we see no reason to change our original conclusion; since DuFour was properly found to be a supervisor, his knowledge of union activities and expressions of management intention can be used by the trial examiner in considering Montgomery Ward's employer knowledge and motivation in connection with the discharges.

We do, however, wish to make the following corrections:

1. Change first two sentences of the last paragraph on page 861 to read as follows:

"In June 1954, Retail Clerks International Association, Local No. 1687, AFL, started to organize Montgomery Ward's Binghamton store, filed a petition for certification on July 16 and in an election on August 17 succeeded in becoming the bargaining representative."

2. Page 867, the third full paragraph is to be replaced by the following two paragraphs:

"As to Felker, Montgomery Ward contends that in July it decided that Felker's and McGraw's departments were to be combined and that since Felker was an unsatisfactory employee, Felker was to be dismissed. There was also testimony by Levengood, Montgomery Ward's district manager, that in March Montgomery Ward decided to replace Felker because he was unsatisfactory. But in July, Felker was asked to head the toy department. If his work was so unsatisfactory that his discharge was contemplated as early as March and decided upon in July, it seems unlikely that he would be assigned to head another department in early July. Nor does any notice or warning of discharge seem to have been given. The abruptness of a discharge and its timing are persuasive evidence as to its motivation. See *E. Anthony & Sons* v. *N. L. R. B.*, 163 F. 2d 22, 26-27 (D.C. Cir. 1947).

"As to Montgomery Ward's allegations that Felker was incompetent, it is undisputed that he was an outstanding salesman. The flaws in his work as department head on which Montgomery Ward purports to rely, were carefully considered by the Board, which concluded that there was little substance to them. With this we agree."

3. The original opinion also erred in stating that Montgomery Ward did not dispute the Board's finding as to store manager Rumble's questioning. But in any event the Board's finding was warranted by the evidence. We therefore delete from the next to the last paragraph of the

opinion, page 868, the words "does not seem to be disputed" and replace them with "is warranted by the record."

Petition for rehearing denied, and original opinion modified.

CHARLES E. CLARK
J. E. LUMBARD
STERRY R. WATERMAN